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IN THE

SUPREME COURT OF THE UNITED STATES

NO. 501

TRUCK DRIVERS AND HELPERS LOCAL UNION NO. 728, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Petitioner,

VS.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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COMMERCIAL RECORDER. FORT WORTH. TEXAS—10-23-59—55

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TO THE HONORABLE EARL WARREN, CHIEF JUSTICE OF THE SUPREME COURT OF THE UNITED STATES, AND THE ASSOCIATE JUSTICES OF SAID COURT:

The petition of Truck Drivers and Helpers Local Union No. 728, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, for the issuance of a writ of certiorari by the Supreme Court of the United States to review a decision, and judgment rendered by the United States Court of Appeals for the Fifth Circuit respectfully shows:

1.

Petitioner was the plaintiff in error in the United States Court of Appeals for the Fifth Circuit in the cause styled Truck Drivers and Helpers Local Union No. 728, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Petitioner, vs. National Labor Relations Board, Respondent, Case No. 17,288. A decision adverse to your petitioner was rendered by the said Court. The said decision is officially reported in 265 Fed. 2d 439.

2.

The said decision was rendered by the United States Court of Appeals for the Fifth Circuit on the 8th day of April, 1959. Within the time provided by law, petitioner filed motion for rehearing, which motion

was denied on June 11, 1959. Judgment was entered by Decree Enforcing, as Modified, the Order of the National Labor Relations Board on July 31, 1959.

3.

Jurisdiction of this Court to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit by writ of certiorari is vested in this Court under Title 28, Section 1254 of the United States Code Annotated.

The United States Court of Appeals for the Fifth Circuit had jurisdiction of this cause by reason of Title 29, Section 160(e) and (f) of the United States Code Annotated. The National Labor Relations Board had initial jurisdiction of this cause by reason of Title 29, Section 141 et. seq. of the United States Code Annotated.

The United States Court of Appeals for the Fifth Circuit denied petitioner's petition to review and enforced an order of the National Labor Relations Board holding that the petitioner had violated Section 8(b)(4)(A) of the National Labor Relations Act, Title 29, Sec. 158 (b)(4)(A) of the United States Code Annotated, and ordering petitioner to cease and desist from such violations and to take other affirmative actions.

This Court is asked to review the judgment of the Court of Appeals for the Fifth Circuit and to determine if the United States Court of Appeals for the Fifth Circuit erred in the following particulars:

(a) In holding that a meeting called by the Union for the purpose of complying with the terms of its contracts and to give notice to employers of its members as to the intent of its members to handle or not to handle struck freight constituted a violation of Section 8(b)(4)(A) of the National Labor Relations Act, Title 29, Sec. 158(b)(4)(A) of the United States Code Annotated.

(b) In holding that the fact that a greater number of employees refused to handle the freight after said meeting than before the meeting established an illegal inducement in violation of Section 8(b)(4)(A) of the National Labor Relations Act, Title 29, Sec. 158(b)(4)(A) of the United States Code Annotated, and in failing to hold that it is necessary to find a violation of said Section of the Act to find not only that employees of secondary employers engaged in a work stoppage following a union's action, but that it is also necessary to establish the union's action was with an illegal intent.

(c) In holding that the said meeting was a per se violation of the National Labor Relations Act, notwithstanding the fact that there was no evidence of

illegal intent in the calling or conducting of said meeting.

(d) In failing to hold that there was no evidence that the meeting was called for any purpose other than to give said notice of intent of their members to the secondary employers, as provided by the contract, and that all of the evidence in the record clearly established that the motive of the meeting was the legal one of ascertaining the intent of the employees and communicating that intent to the secondary employers so that said employers would be forewarned of any work stoppage in time to minimize any damages flowing therefrom.

(e) In concluding that the result of the meeting was the unanimous passage of a resolution that committed all the members, even absent members, to a secondary boycott, leaving no room for any discretion by any employees who might later decide to handle the goods and in not concluding from the undisputed, uncontradicted evidence that no one was bound by any action taken at the meeting, and that the only purpose of any action taken at the meeting was to ascertain the intent of the employees for the purpose of transmitting that intent to their employers and was not for the purpose of binding any employee to refuse to handle the freight of Genuine Parts Company and did not bind any employee to refuse to handle the freight of Genuine Parts Company.

(f) By holding in effect that any attempt by the Union to ascertain the intent of the employees constituted a violation of the Act and making it impossible for the petitioner to fulfill its contractual obligation of forewarning the employer of any impending work stoppage, thereby probably releasing the employer from his contractual obligations and making the "Protection of Rights" clause of no effect, notwithstanding the holding of this Court in the case of Local 1976, *United Brotherhood of Carpenters, etc. v. N. L. R. B.*, 357 U.S. 93, that such a clause is not illegal.

(g) In failing to hold that the job stewards are not agents of the petitioner and that there is no substantial evidence of such agency.

(h) In failing to hold that the Board erred in going beyond the record to determine that the job stewards were agents of the petitioner.

(i) In attaching weight to alleged statements of job stewards when agency had not been known and there was no substantial evidence that such statements had been made.

(j) In failing to find that the record does not contain substantial evidence that the petitioner has violated Section 8(b)(4)(A) of the National Labor Relations Act, Title 29, Sec. 158(b)(4)(A) of the United States Code Annotated.

(k) In denying the petition to review and the petition for rehearing filed by the petitioner herein and in enforcing the Board's order.

The statute under which the Board issued complaint and which the Board and the United States Court of Appeals for the Fifth Circuit found had been violated is Title 29, Sec. 158(b)(4)(A) of the United States Code Annotated. Said portions of said subsections being found on Pages 258 and 259 of United States Code Annotated, and being as follows, to wit:

> "(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is; (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; (B) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this article; (C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another

labor organization has been certified as the representative of such employees under the provisions of section 159 of this title; (D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work: *Provided*, That nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this subchapter;" Only subsection (b)(4)(A) is alleged to have been violated.

STATEMENT OF THE CASE

The Local Union has, and during all times material to this controversy had, labor contracts with a number of "carriers." Included in each of these contracts is a form of "unfair goods", provision or provisions which read as follows:

> "It shall not be a violation of this Agreement and *it shall not be cause for discharge if any employee or employees refuse to go through the picket line of a Union or refuse to handle unfair goods.* Nor shall the exercise of any rights per-

mitted by law be a violation of this Agreement. *The Union and its members, individually and collectively, reserve the right to refuse to handle goods from or to any firm or truck which is engaged or involved in any controversy with this or any other Union; and reserve the right to refuse to accept freight from, or to make pickups from or deliveries to establishments where picket lines, strikes, walkout or lockout exist.*"

"*The Union shall give the Employer notice of* all strikes and or the intent of the Union to strike any Employers and or place of business, and or *the intent of members' refusal to handle unfair goods* . . . The insistence on part of any Employer that his employees handle unfair goods or go through a picket line after they have elected not to, and such refusal has been approved in writing by the responsible officials of the Southern States Drivers Council, shall be sufficient cause for an immediate strike of all such Employers' operation without any need to go through the grievance procedure herein." (Emphasis Supplied).

On or about March 19, 1956, the Local Union was engaged in a bona fide labor dispute with Rayloc Division of Genuine Parts Company and in connection with this dispute established a picket line at the Rayloc place of business. The labor dispute was a proper labor dispute and the picket line at the Rayloc operations was legally and properly maintained.

When this picket line appeared, a number of employees of various carriers, themselves members of the

Local Union, refused to cross the picket line and pick up or deliver goods to Rayloc. Rayloc secured other means of pickup and delivery service, and when Rayloc's goods appeared on the loading docks of interlining carriers some of the carrier employees (members of the Local Union), exercising their rights under this contract, refused to handle Rayloc goods.

Under the provisions of the contract quoted above, the carriers were entitled to have the Local Union ascertain whether its members were or were not going to handle Rayloc goods and communicate that intent to the carriers. This particular portion of the provision was obviously incorporated into the contract by the carriers for their protection in order that they might make other provisions and avoid a sudden piling up of struck freight on their trucks. The Local Union was under a contractual obligation to give them this information. In addition to performing this obligation for the fundamental reason that it had a legal obligation to do so, Local Union also had to carry out this obligation as a measure of protection for its members since, if the Local Union breached this obligation, the legal result would be that the carriers might either have a damage claim against the Local Union for breach of contract, or might be released from their obligations under the contract and might, with immunity, discharge the employees for refusal to handle.

The Local Union had some 5,500 members in the Atlanta area, of whom about 2,500 were involved in

this problem. In order to carry out its contractual obligation to ascertain whether the members were going to refuse to handle Rayloc goods and communicate this information to the carriers, the Local Union called a special meeting of its employees, posting a bulletin calling such special meeting on the board at each carrier. At this meeting, the full details of which are supplied in the Appendix to the Brief of Petitioner in the Court of Appeals and accurately summarized by the Trial Examiner in his Intermediate Report (Pages 36 and 37 of the Transcript), the Secretary-Treasurer of the Local Union carefully explained that each man had a voluntary decision to make, that they were not being requested or encouraged either way by the Local Union, and that they would not be bound by any action taken in the meeting. He explained carefully to them that the sole purpose of the meeting was to ascertain, in the best way the union knew how, whether they were going to handle Rayloc goods or not, and that each member was requested to make his decision to the Local Union officials at the meeting.

Despite this careful explanation, one of the members made a motion that members of the Local Union refuse to handle the goods of Rayloc. The Chairman explained to this member that this motion was out of order, that the membership could not pass a motion that would bind the members and that each member had an individual decision to make.

It appearing from the discussion that every man present wished to express his decision not to handle Rayloc goods, a substitute motion was presented in which each man who had decided not to handle Rayloc goods could so indicate by a raised hand, which resulted in a unanimous raising of hands.

After this motion was unanimously passed, the Chairman again explained to the members that they were not bound by the resolution and that it was only an expression of their individual decisions in order to give the Local Union information upon which to base a notice to the carriers in accordance with the contract.

The foregoing meeting furnishes the main core of the alleged violation of Section 8(b)(4)(A). It is contended by the Board that the contractual provision is, per se, illegal, its mere execution evidence of its intent to violate Section 8(b)(4)(A), and any action taken by the Local Union in connection with said contract necessarily illegal and violative of Section 8(b)(4)(A).

It is the position of the local Union that the contractual provision is not, per se, illegal. The Local Union does not contend that the existence of the contract would be a defense as to any otherwise illegal actions taken. The Local Union contends that its action in calling the meeting was legal, and was justified and required by the obligations of the contract. These are the primary contentions which this reviewing Court is called upon to decide.

The other matters which present themselves by the record are a few fragmentary statements attempted to be attributed to job stewards which will be discussed in this petition.

Subsequent to this meeting, the Local Union notified the carriers of the intent of the employees not to handle Rayloc goods, and subsequent thereto (as well as prior to the meeting), many of the employees refused to handle Rayloc goods although some employees, both before and after the meeting, did handle such goods.

The Board issued a complaint against the Local Union for violation of Section 8(b)(4)(A) and instituted a Section 10(1) injunction proceeding before Honorable Boyd Sloan, United States District Court, in Atlanta. Substantially the same evidence was introduced at this injunction proceeding as was later introduced before the Trial Examiner, and after consideration thereof the District Judge refused the injunction, holding that the Board did not have reasonable cause upon which to base a violation of Section 8(b)(4)(A).

The matter was then brought on for hearing before the Trial Examiner who later issued a complete, detailed and well reasoned report in which he agreed with the District Judge that no violation had occurred.

The Board reversed the Trial Examiner and held that the Local Union had violated Section 8(b)(4)(A)

and imposed not only the usual cease and desist order but, on its own motion, imposed its so called "broad order" which is usually reserved for extremely flagrant matters and imposed on unions which are shown by the evidence to have a long previous history of similar violations.

In reaching this rather surprising result, the Board did the following things:

1. Violated the due process clause of the United States Constitution by holding the contract clause illegal per se despite the fact that the Local Union and the Board had at the trial entered into a stipulation that the legality of the contract provision was not questioned, which stipulation was approved and acted upon by the Trial Examiner.

2. Made a clear error of law, which basically controlled the case, in holding the contract provisions above quoted to be illegal per se and themselves violative of Section 8(b)(4)(A), which holding was subsequently disapproved by the United States Supreme Court in its review of another case (*Local 1976, Etc. v. National Labor Relations Board*, 78 Supreme Court 1011).

3. In holding that the contract itself and any action taken in pursuance thereof were illegal per se and prima facie evidence of illegal inducement, the Board completely disregarded the fact that at the time of the execution of the contract, and at the time of the

meeting, and, even at the time of the hearing before the Trial Examiner, the Board itself had consistently held that the type of contract was not illegal and all of the decisions of the Circuit Courts of Appeal had similarly so held.

4. Misrepresented the Local Union's contention, as made by its pleadings, even to the point of purporting to quote words from the answer which were not there, and in so doing acted upon a gross misconception of what the Local Union's defense was.

5. In passing upon the evidence in connection with the fragmentary statements attempted to be attributed to job stewards, the Board ignored all of the legal rules of agency and the clear uncontradicted evidence in the case, and designated the stewards as agents of the union on an apparent basis of "never mind the evidence, we know better." In crediting hearsay and double hearsay evidence in the face of direct contradictory evidence, with reference to these fragmentary statements attempted to be attributed to job stewards, the Board recited that it was utilizing evidence credited by the Trial Examiner; when the Trial Examiner had actually ruled all of this out as being not binding on the Local Union, and had in one instance specifically discredited the testimony and in another instance stated clearly that he was not passing upon the credibility.

6. In attempting to justify its clearly erroneous conclusion that the contract was illegal, that the Local

Union was guilty of illegal intent in signing such contract and that any action taken by the Local Union in connection with said contract was necessarily illegal, the Board gathered up every fragment of evidence of statements alleged to be made by job stewards, disregarded the ruling of the District Judge and the recommendation of the Trial Examiner that these statements were not admissible against the union, gave credit to all such statements, including those derived from hearsay and double hearsay even though opposed to direct legal evidence, credited them all regardless of whether the Trial Examiner had credited them, discredited them or ruled them out without passing upon their credit, gave emphasis to, and derived inferences therefrom, which no objective and reasonable person would do, and totally ignored the clear and unimpeached evidence to the contrary of union intent and the manner in which the Local Union handled the matter from start to finish.

7. After convicting the Local Union in this unfortunate fashion, the Board then proceeded to impose its "broad order" upon the union, even though no such order was requested at the trial before the Trial Examiner and no evidence whatsoever was introduced as to any other violations of this Local Union, and where the record shows no foundation whatsoever upon which to base a so-called "broad order" even if it be conceded that the Local Union had technically violated the Act in some fragmentary fashion, which the Local Union, of course, does not concede but strongly negates.

The petitioner herein filed a petition for review in the United States Court of Appeals for the Fifth Circuit and the respondent, the National Labor Relations Board, filed a counter-petition to enforce the order of the Board. The opinion of the United States Court of Appeals for the Fifth Circuit, denying the petition to review and granting enforcement of the Board order, was issued on April 8, 1959. Petition to Rehear was denied June 11, 1959 and on the 31st day of July, 1959, a decree was entered failing to grant the petition to review and granting enforcement of the Board order as modified. The Board, in its order, directed the Union to cease and desist from engaging in and from inducing or encouraging carrier employees to engage in a strike or concerted refusal to handle Genuine Parts freight or the freight of any other like person or company who has business relations with aforesaid carriers in the Atlanta area. The Court, in its Decree deleted the words "or with any other like person or company who has business relations with aforesaid carriers in the Atlanta area."

REASONS REVIEW SHOULD BE GRANTED

Petitioner respectfully submits that this Court should grant this review on certiorari because the case involved is of great public concern and contains matters of gravity and importance, not only to your petitioner, but also to others similarly situated throughout the entire United States. The gravity and importance of the matters in the public concern will be manifest to this Court upon a consideration of

this petition for certiorari. Petitioner suggests and urges the following reasons, among others, which this petition for certiorari comes within the purview of this Court and should be granted:

(1) "Protection of Rights" clauses are incorporated in all of the contracts of the unions affiliated with International Union of Teamsters, Chauffeurs, Warehousemen and Helpers of America, constituting the greater per cent of the bargaining contracts in the motor carrier industry.

(2) Thousands of said contracts contain a provision similar to the provision contained in the case at bar, providing that the union must advise the employer of the intent of its employees as to whether or not they will handle unfair goods.

(3) There is no way that any union can comply with said provision of the contract and give said notice unless it ascertains the intent of its members so that it may advise the employers of that intent.

(4) There is no way that the intent can be ascertained unless the union asks its employees their intent and there is no practical way that thousands of employees can be asked their intent other than to ask their intent at a mass meeting.

(5) The provision that the employer shall be notified of the intent of the employees not to handle the freight is placed in the contracts for the employer's

benefit so that the employer will not have a pileup of freight on the dock without any warning that a work stoppage is going to ensue.

(6) The obligations of the employer to respect the "Protection of Rights" clause of the contract and not to take reprisals against employees who refuse to handle struck goods is based upon a reciprocal agreement by the union that the employer will be forewarned of such work stoppage and will have an opportunity to make provisions therefor.

(7) If this obligation is not fulfilled by the union, the employer probably is not required to abide by his obligations under the contract, for to do so would cause the employer to incur monetary loss which fulfillment of the contract by the union would prevent.

(8) Therefore, the validity and enforceability of all "Protection of Rights" clauses in the transportation industry has been thrown into doubt as a result of the decision of the United States Court of Appeals for the Fifth Circuit in this case and no carrier in the United States and no union contracting with a carrier in the United States now knows whether the union can fulfill its obligations to minimize any damage resulting from a work stoppage by giving a notice to the employer and, therefore, whether the employer is under any obligations to honor a "Protection of Rights" clause of a contract.

(9) Notwithstanding the decision of this Court in the case of *Local 1976, United Brotherhood of Carpenters, etc. vs. N. L. R. B.*, 357 U.S. 93, 78 S.Ct. 1011, that a "Protection of Rights" clause is not illegal, the enforceability of all such clauses throughout the entire United States involving thousands of contracts in the transportation industry has been thrown into serious doubt by the decision of the United States Court of Appeals for the Fifth Circuit.

(10) The recent amendments to the National Labor Relations Act, enacted in 1959, in no way render this issue moot. Said amendments to the Act prohibit an employer from executing a contract whereby said *employer* agrees not to handle struck goods. There is no prohibition either in the original Taft-Hartley Act or in said amendments thereto, against executing a contract containing a provision that *employees* may make an individual election as to whether or not they will handle struck goods. The only prohibition is against the employer agreeing that the *employer* will not handle such goods and there is no specification as to through whom it will handle the goods and there is no requirement that the goods be handled through any specific person or persons. There are numerous ways in which an employer may handle struck goods other than through its employees. For example, the goods may be handled by supervisors, by making an arrangement with lease operators, by making a cartage agreement with a cartage company and by other means and methods. There is no provision in the "Protection of Rights" clause in the case

at Bar which in any way commits the *employer* not to handle struck goods. It only provides that the employer's *employees* may not be compelled by the employer to handle struck goods contrary to their election not to do so. Under the Interstate Commerce Act it has been illegal for years for a common carrier to contract that it would not indiscriminately handle freight of any one who presented freight to it and the Interstate Commerce Commission held, in the case of *Galveston Truck Lines Corp. v. Ada Motor Lines, Inc.*, 73 M.C.C. 617, that a hot cargo clause did not excuse the carrier from handling the freight but that the carrier must handle the freight notwithstanding a refusal of its employees to handle the freight. Although the Taft-Hartley Act has been amended, the basic responsibility of a common carrier to handle freight, notwithstanding a work stoppage by its employees, has not been changed. It has always had the obligation to find other means to handle struck goods when its employees refused to do so. Since Congress has merely prohibited in the Taft-Hartley Act what was already prohibited in the Interstate Commerce Act, the carrier's obligations have in no wise been changed. It would have been illegal prior to said amendment to the Taft-Hartley Act for an employer to have executed a contract in which the *employer* had agreed that *it* would not handle struck freight as such a contract clause would have been a violation of the carrier's duties under the Interstate Commerce Act. The carrier has not agreed in the contract in the case at Bar that *it* will not handle struck goods, but has merely agreed that it will handle

said goods through instrumentalities other than its employees in the event the *employees* elect not to handle the freight. There is nothing in said amendment to the Taft-Hartley Act which in any way prohibits such a contract clause.

The fact that it is illegal for the employer to agree not to handle struck freight and it must make other provisions for the handling of such freight, makes it absolutely imperative that the employer be forewarned by the union as provided by the contract in the event the employees will not handle the freight, so the employer will have time to make other arrangements to carry out its legal obligations to handle the freight without any work stoppage occurring. If the employer has a work stoppage because the employees refused to handle the freight and has no advance notice of this work stoppage, there may be a time lag in the handling of the freight while the employer makes other arrangements. On the other hand, if the union complies with its contractual obligations and gives the advance notice of employees' intent not to handle the freight as it is required to do by the contract, the employer will have ample time to arrange to handle the freight through lease operators, supervisors, cartage agreements or other methods.

ARGUMENT

The National Labore Relations Board prefaced its case upon the false premise that the "Protection of Rights" clause was invalid upon its face and per se.

evidence of violation of the National Labor Relations Act. The Board so held, notwithstanding the fact that the parties stipulated at the trial that the legality of the contract was not under attack, and this stipulation was approved by the Trial Examiner and acted upon by him and no evidence or argument relating to the legality of the contract was ever had, either at the trial level or later. This decision of the Board that the "Protection of Rights" clause was illegal was expressly disapproved by the Supreme Court of the United States in the case of *Local 1976, etc. vs. National Labor Relations Board*, 78 S.Ct. 1011, the Supreme Court making specific reference to the case now at Bar. In said case, the Court held:

> ". . . Certainly the voluntary observance of a hot cargo provision by an employer does not constitute a violation of Section 8(b)(4)(A), and its mere execution is not, contrary to the suggestion of two members of the Board in the Genuine Parts case, Truck Drivers Union, 119 N.L.R.B. 399, prima facie evidence of prohibited inducement of employees. It does not necessarily follow from the fact that the unions cannot invoke the contractual provision in the manner in which they sought to do so in the present case that it may not, in some totally different context not now before the Court, still have legal radiations affecting the relations between the parties. All we need now say is that the contract cannot be enforced by the means specifically prohibited in Section 8(b)(4)(A)."

In this case the Supreme Court held the following things with reference to hot cargo provisions in general:

(1) They are not per se illegal.

(2) Their execution does not constitute prima facie evidence of illegal inducement.

(3) There are permissible areas in which the contracts can be legally given effect.

(4) The contract does not, however, give the union a right to induce its members to exercise their individual rights not to handle struck freight. (The Local Union does not contend and never did contend that it does.) We submit that, in light of this decision, the principal structure of the Board's ruling, namely, that the clause itself was illegal, must fall, and we believe that the Board's entire case in actuality ought to also fall with it.

Any change in the law subsequent to the actions alleged could have no possible bearing upon the merits of this case. However, in determining whether certiorari should be granted, the question may arise as to whether the 1959 amendments, Section 704(b)(e), now make said clause illegal. Said Section 704(b)(e) provides:

> "It shall be an unfair labor practice for any labor organization and any employer to enter

> into any contract or agreement, express or implied, whereby such *employer* ceases or refrains or agrees to cease dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void." (Emphasis supplied.)

It will be observed that the only prohibition contained in said clause is a prohibition against an employer agreeing that the *employer* will not handle struck goods. A reading of Article IX of the Southeastern Over-the-Road Motor Freight Agreement, the clause in question at Bar, clearly reflects that it does not violate said Section of the Act of Congress. Said clause reads in part as follows:

> "It shall not be a violation of this Agreement and it shall not be cause for discharge if any employee or employees refuse to go through the picket line of a Union or refuse to handle unfair goods. Nor shall the exercise of any rights permitted by law be a violation of this Agreement. The Union and its *members*, individually and collectively, reserve the right to refuse to handle goods from or to any firm or truck which is engaged or involved in any controversy with this or any other Union; and reserve the right to refuse to accept freight from, or to make pickups from, or deliveries to establishments where picket lines, strikes, walkout or lockout exist." (Emphasis supplied.)

It will be readily observed that nowhere in said clause is there any agreement that the employer will not handle struck freight. The only provision is that the employees may make an individual election as to whether they, the employees, will handle the struck freight and that the employer will not engage in reprisals against them for making such an election. There is no prohibition in the recent amendments to the Taft-Hartley Act against an employer agreeing that it will not take reprisals against the employees who refuse to handle unfair goods. The only prohibition is against the employer itself refusing to handle unfair goods. It has at all times been illegal under the Interstate Commerce Act for a carrier to execute a contract in which it agrees that it will not handle all freight indiscriminately and the Interstate Commerce Commission has held, in the case of *Galveston Truck Line Corp. vs. Ada Motor Lines, Inc.*, 73 M. C.C. 617, that the "Protection of Rights" clause in a contract did not excuse the carrier from handling the freight in the event there was a strike. The recent legislation only makes illegal under the Taft-Hartley Act what was previously illegal under the Interstate Commerce Act and does not change the obligations of the carrier at all. The carrier now is required to indiscriminately handle freight and the carrier was required to indiscriminately handle freight prior to the passage of such legislation.

Article IX of said contract does not provide that the employer will not handle freight and does not even commit its employees not to handle freight, but

merely reserves to the employees the power of decision as to whether they will or will not handle the freight.

The sole requirement is that the employer cannot contract away its obligation to handle the freight, there being no specification as to through whom it will handle the freight and there being no requirement that the freight be handled through any specific person or persons. There are numerous ways in which an employer may handle struck goods other than through its employees. For example, the goods may be handled by supervisors, by making an arrangement with lease operators, by making a cartage agreement with a cartage company, and by other means and methods. An act which merely provides that an employer cannot contract that it will not handle the goods cannot be stretched by construction to provide that the employer must handle struck goods through the medium of certain persons.

Said Article IX in the contract also provides:

> "The Union shall give the Employer notice of all strikes and or the intent of the Union to strike any Employer and or place of business, and or the intent of members refusal to handle unfair goods."

This provision, if complied with by the Union, makes it not only possible but also practicable for the employer to handle the freight through means other than its employees. If the employer is warned that there

is going to be a strike and is warned in advance that the employees are refusing to handle unfair goods, the employer then has adequate opportunity to make arrangements to comply with its obligation to indiscriminately handle the freight by arranging for handling the freight through lease operators, cartage agreement, or other means and methods. Said Article IX of the contract not only does not prohibit the employer from handling struck freight, but places obligations upon the Union which make it practicable for the employer to handle the freight without the slightest delay when the freight is presented. This clause is placed in the contract for the benefit of the employer, rather than the benefit of the Union. If the employer was confronted with a sudden work stoppage without advance notice, there could be a pile-up of freight which could be perishable and which, in any event, would cause it to lose good will of customers and which might make it more difficult to fulfill its obligations under the Interstate Commerce Act to indiscriminately handle the freight when presented. On the other hand, with advance notice being given, the employer could make arrangements, as aforesaid, whereby it could meet its obligations to its customers and its obligations under the Interstate Commerce Act to handle the freight when it was presented, notwithstanding a refusal to handle the freight by its employees.

It was to meet this valid contractual obligation to the employer that the Union called the meeting which both the National Labor Relations Board and the

United States Court of Appeals for the Fifth Circuit have held to be per se violative of the National Labor Relations Act.

The question which arises is what was the motive for the calling of the meeting. On this point, both the National Labor Relations Board and the Court of Appeals for the Fifth Circuit appear to have completely misinterpreted the position of petitioner herein. It has never been the position of the Union that any provision of the contract gave the union the right to induce employees of secondary employers not to handle struck freight, but rather that the Union had never so induced said employees. It has never been the position of the plaintiff in error that said clause of the contract gave it the right to induce employees of secondary employers not to handle the freight. It has, at all times, been the position of the Union that it has never induced employees or employers not to handle the freight and that the motive of the meeting which was called was not to induce the employees, but was to fulfill its contractual obligations to the employer. A failure to comply with the contractual provisions that a notice must be given to the employer of any impending work stoppage or refusal to handle freight could have most unfortunate consequences to the Union and its membership. Under Section 301 of the National Labor Relations Act, Title 29, Section 185 of the Code of the United State Annotated, any party which violates the provisions of a contract is subject to suit for damages. To have failed to give the notice required by the contract would have sub-

jected the plaintiff in error to suit for heavy damages. Over 20 carriers in the Atlanta area had collective bargaining contracts with the plaintiff in error at the time of said strike and the plaintiff in error could have been subjected to as many as 20 damage suits, running into many thousands of dollars, resulting from freight perishing or loss of customers by the secondary employers, due to the failure of the Union to forewarn the employers and enable the employers to make other provisions for the handling of the struck goods. This was not a theoretical problem, but a most practical problem. The employers could well have suffered considerable damage and loss of business which could have been completely alleviated by the giving of a proper notice as required by the terms of the contract. A further consequence of the failure of the plaintiff in error to give the notice required was that the employer's agreement not to take reprisals against its employees if they should individually elect not to handle the freight was prefaced upon the Union giving the employers sufficient time to make other arrangements for the handling of the freight by the giving of said notice. If the Union failed to give the notice required it could well be argued that the employer was under no obligation to abide by its agreement not to take reprisals against its employees who refused to handle the freight, even to the extent of discharging them.

It is, therefore, apparent that it was the legal contractual duty of the Union to give notice of the intent of its employees.

The question that then arises is whether the Union ascertained the intent of its members in a legal or illegal manner. Some 2500 employees were involved. The Union employed, at that time, seven business agents. The employees were over-the-road drivers and were out of the city a considerable period of time. It was a physical impossibility for the Union to individually contact each of the employees of the secondary employers to ascertain their intent. The only practical way of ascertaining their intent was to call a meeting at which they were asked what their intent might be. It is apparent that the Union could not know the intent of its members unless it asked the members their intent. At the hearing on the prayer for 10(1) injunction before Judge Boyd Sloan, United States District Judge for the Northern District of Georgia, the Honorable Boyd Sloan requested Counsel for the Board to suggest some other method whereby the intent of the employees could have been ascertained and Counsel for the Board was unable to answer the question. Some three months later at the hearing on the merits before the Trial Examiner of the National Labor Relations Board, the Trial Examiner propounded the same question to the Counsel for General Counsel of the Board and the Counsel for the General Counsel was unable to suggest any other method whereby the intent of the employees could be ascertained. Therefore, the Union resorted to the only possible method whereby it could ascertain the intent of its employees and the calling of the meeting for that purpose not only did not violate the law, but was required for the

Union to carry out its legal obligations under a valid contract executed with the various carriers.

The question then arises as to whether the meeting which the Union had a right to call for a legal purpose was so conducted as to, in fact, constitute an inducement of employees of secondary employers, rather than merely to ascertain the intent of said employees for the purpose of fulfilling the terms of the collective bargaining contract. In other words, did the meeting establish the motive of the Union to be a legal motive, or did the meeting establish that the actual motive of the Union in calling the meeting was to engage in conduct violative of the National Labor Relations Act?

The evidence as to what occurred at said meeting is totally uncontradicted and therefore there are no factual issues as to what actually occurred. The conclusions drawn from the facts by the Court of Appeals for the Fifth Circuit were totally unsupported by the facts. For example, the Court of Appeals held as follows:

> "The result of the meeting was the unanimous passage of a resolution that committed all the members, even absent members, to a secondary boycott. Under the resolution there is no room for any discretion by any employees who might later decide to handle the goods. It binds all in advance, preventing the exercise of individual action at the time when individual action is mean-

ingful—that is, when the goods arrive at the dock to be unloaded."

It is respectfully submitted that there is not a scintilla of evidence in the record to support that conclusion of the Court and all of the evidence in the record is completely contrary. The completely uncontradicted testimony of Weldon Mathis, secretary-treasurer of the union, who presided over the meeting was as follows:

"Q. Did you consider after this resolution was passed that each member was free to handle that freight or not handle it as he choose?

A. Certainly did; that is what the resolution says.

Q. But you had no instance reported where a member did actually handle it?

A. Oh, I know of a number of cases where they did actually handle it . . . (Appendix to Petioner's Brief in the Court of Appeals, Page 17).

(By Mr. Pearce):

Q. Then I will hand you, Mr. Mathis, the respondent's answer and direct your attention to the contractual provisions that are reproduced there in paragraph 4 and I will ask you to state whether or not you were familiar with those contractual provisions?

A. Yes.

Q. And is it with reference to those contractual provisions that you discussed with your attorneys—

A. Yes, it was.

Q. Was it your purpose to be sure you understood the legal meaning of it and to ascertain what the union's position ought properly to be?

A. That is correct.

Q. All right. May I have that back.

Now, calling you special attention to the portion of the contract which provides that you notify the carriers or the employers of the intention of the members to either handle the goods or refuse to handle the goods, did you come to the conclusion after reading your contract and talking with your lawyers that you had to make some effort to find out the intent of the members and to notify the carriers, the employers, of those intents?

A. That is correct.

Q. Now, I believe you said you had about how many members?

A. It is awfully had, but I would think four or five hundred members.

Q. No, I don't mean—you are speaking of at the meeting now; I mean how many members?

A. About fifty-five hundred.

Q. Now, all of those members are working for carriers who would be affected by this strike, are they?

A. I think less than half.

Q. You would think probably less than half of that number—

A. —are working for carriers that would be affected, yes.

Q. So, in other words, you had at that point a job or a problem of ascertaining the intent of perhaps twenty-five hundred members; is that correct?

A. That is correct?

Q. And did you call the meeting after discussion with your attorneys as to the best way of ascertaining the intent of these twenty-five hundred members?

A. Yes, that was the main purpose of discussing it with the attorneys.

Q. And was that your main purpose in calling the meeting after your discussion?

A. Yes, to determine what they wanted to do.

Q. Would you mind telling the trial examiner and the record why you decided that it wasn't feasible to go individually to each of the twenty-five hundred people and ask each one individually?

A. I can give you a good reason. We have got seven agents besides Cook and myself to contact twenty-five hundred people. (Appendix to Petitioner's Brief in the Court of Appeals, Pages 20, 21).

Yes. A lot of our people, of course, are over-the-road drivers, or some of them are, and to try to contact twenty-five hundred people, if we worked twenty-four hours a day with seven agents, we would have to close up our office for a couple of months. You just don't walk up and ask a member a question and walk off. If you ask him a question, he will ask you fourteen.

(By Mr. Pearce):

Q. So you had the question of time and number of people, number of members, for one thing, did you not?

A. The meeting was the only way.

Q. I am trying to get in the record your reason for that.

A. Yes.

Q. That is, the number of members to see and the length of time it would take to see them would be, in your opinion, and was at that time, impossible?

A. It would be an impossible task.

Q. And yet you had, I believe, and understood after studying your contract and talking with

your lawyers, you had a duty to get that intent and convey it to the company?

A. That is right.

Q. Well, did you determine upon a called meeting as the best way for you to discharge the obligation?

A. It was not only the best way, but it was the only way.

Q. Now, I believe that was a special meeting. Will you state for the record how you went about calling it? I mean how you, what the mechanics were in notifying the members as far as you could that there was going to be a meeting?

A. I am sure almost that a notice was sent out to the stewards requesting a special-called meeting for this night, and then on the bottom of the notice there was a notice to the steward to post it on the board. When I said "board," most all companies have a bulletin board around the time-clock where the members come one or twice a day.

Q. Is that the customary way for the union to get any message of any sort to its members, to send a written notice to the stewards to post on the bulletin board?

A. That is the only way we ever put a notice out.

Q. Is that the normal and customary way in which you get messages to your members?

A. Yes, it is.

Q. And did you do that in this case?

A. Yes.

Q. And as far as you know, was that notice sent to every carrier that you had members working for?

A. Yes.

Q. Did you eliminate or omit any carrier for which you had members working in sending that notice?

A. No.

Q. Did you make an effort to get that notice to every one of your members in that manner?

A. We did, sir. (Appendix to Petitioner's Brief in the Court of Appeals, Pages 22, 23, 24).

Q. Now, you were asked some questions awhile ago and also your minutes state that you explained the purpose of the meeting to your members. Would you state as shortly as you can just the substance of what that explanation was? Just what did you tell your members about the problem?

A. Well, I explained to the members of the position we were in with Rayloc, that we had, of course, won the election and negotiated and the

negotiations fell down and we had struck Rayloc. I explained also to them that we had been receiving telephone calls from various members all over the city wanting to know what to do. We were worried that some of our members would refuse to handle freight and they would be discharged. I explained all of that to them, and I also explained to them that under the contract we had to notify the employer that they intended not to handle it, or if they intended to handle it, then there would be no reason for notifying them. That was in substance what the explanation was that I gave.

Q. Did you explain to them the provisions of the contract relating to their right to handle or not to handle?

A. I read the article to them out of the contract.

Q. Did you make it clear to them that they had, each one of them had a right to determine for himself whether he would handle it or would not handle it?

A. I did. I explained that before the vote was taken and afterwards. I explained again that I wanted every person in there to understand that it was their right and their decision to make.

Q. Did you tell them that the union wanted them to decide not to handle it?

A. No, I didn't tell them the union wanted them to do anything. I told them they had a right to handle it or refuse to handle it.

Q. Did anybody during the course of the meeting, any official or anybody else during the course of the meeting, make any statement about the union requiring these members not to handle it?

A. No, there was no statement made. I am the only officer of the local union that talked that night.

Q. Did you tell any of the members either at the meeting or elsewhere that they as a matter of union policy had to refuse to handle it?

A. No.

Q. Did you tell them that the union wanted them to refuse to handle it?

A. No.

Q. Do you believe that you made it clear to them that the union's position was that they had the individual right to handle or not handle, as each one of them chose?

A. I think I did, yes.

Q. All right, now were there any questions raised, did any of the members ask any questions about it on the floor?

A. Yes, I guess we discussed the thing back and forth for an hour or so.

Q. In other words, some of the members had questions about what their rights were and what would happen to them, and so forth?

A. Yes.

Q. In answering those questions, did you tell them at any time that the union was insisting or even asking that they refuse to handle it?

A. I made it very clear that the union was taking a neutral position, that we had to, that it was their right and their decision to make. They were to decide whether or whether not to handle it.

Q. I believe you said you didn't tell them the union wanted them to refuse?

A. No, I did not.

Q. Did you say there was a discussion for an hour or perhaps longer on the floor?

A. Yes.

Q. Now, at that time during the discussion what was the first thing that happened with reference to a resolution? Did you propose one or did somebody on the floor propose one?

A. Someone on the floor proposed a motion.

Q. You believe that was Mr. Kent?

A. Yes, we adjourned shortly after the resolution was taken. I would think we were in a meeting an hour before that motion was made.

Q. As well as you can remember the substance of Mr. Kent's motion, would you state it; in other words, as close as you can remember as to what he got up and said?

A. Well, I think that he probably said that he would make a motion that the members of Local 728 refuse to handle the goods of Rayloc and Genuine Parts.

Q. Did you then explain to him and to the members that with reference to his motion the members could not pass a motion that would bind the members: that it was still an individual decision?

A. I did.

Q. Did you make it clear that his motion as he made it was probably not proper to pass because it would indicate that it would bind the members to refuse to handle because of the motion?

A. Yes.

Q. And then was that the reason and the occasion for your redrafting the motion?

A. Yes, it is . . .

A. (Continuing) I would like to explain, if I may, this is not an unusual procedure for the officer in charge of the meeting to reword a motion, as you can well understand.

Q. Well, now, after you made the explanation, both to Mr. Kent and to the rest of the members, about the problem with reference to the motion, that is, the fact that they could not properly pass a motion that would bind all of the members, or even the members there, not to handle the goods because of the motion, but there would still be an individual decision, did Mr. Kent agree to your rewording of the motion?

A. Yes, he did.

Q. And then was it then placed on the floor?

A. It was.

Q. I will ask you, I believe you said it was by a show of hands?

A. Yes.

Q. I will ask you if you both called for a show of hands in favor of the motion and a show of hands against the motion?

A. Yes.

Q. Was there a show of hands in favor of the motion?

A. Yes.

Q. Did it appear to you to be the entire membership?

A. Yes.

Q. When you called for a show of hands in opposition to the motion, was there any opposition or any hands raised at all?

A. No hands raised at all.

Q. I will ask you if you then again explained to them even after the motion was passed anything about whether or not they were bound by the motion to refuse or whether they still had the individual right to do what they wanted to do?

A. *I explained to them that this motion bound nobody, that this motion, the only thing it did was give me a right to notify the employer that the people had indicated to us that they desired to refuse to handle the goods of Rayloc and Genuine Parts and that nobody was bound by the motion, even that the people that voted for it could go right back out and handle the freight.*

Q. Did you make that clear to the men at the meeting?

A. Yes, I explained it three or four times. (Appendix to Petitioner's Brief in the Court of Appeals, Pages 25, 26, 27, 28 and 29).

It is hard to conceive of any way in which the union could have used a greater precaution to be certain that no employees were induced as to whether they would or would not handle the freight of Genuine Parts Co., otherwise referred to herein as Rayloc. The Union not only had a legal right but had a legal

duty to call this meeting and very carefully restricted the meeting to the purpose for which it was called, that being to give to the other contracting parties whatever notice might be required by the terms of the contract. By every conceivable manner the Union made clear that it was taking absolutely no position as to what its members should do, but that the employees were completely free to make their own decision without even any suggestion from the Union as to what it might desire. This was made clear both before and after said vote was taken.

This is not a situation where the above statements were made and subsequent actions of the petitioner established that they were not made in good faith. For example, Appendix to Petitioner's Brief in the Court of Appeals, page 36, contains the following testimony of Mathis:

> "Q. Now, I want you to tell me this, I want to ask you generally, not restricted to this meeting of March 27th, but I want to ask you generally if the union has ever told any of its members that if they handled these unfair goods they would be fined or discharged or suspended from the union?
>
> "A. No agent to my knowledge has ever told any member that.
>
> "Q. Have you ever told any member that?
>
> "A. I have never told any member that.

"Q. Has the union, as far as you know, ever told any member that through any medium at all?

"A. No.

"Q. I believe you stated that even after this meeting of March 27th, and even after you communicated this notice to the company, to the various companies, that the members were electing not to handle the freight, I believe you stated there were individual cases where the men did handle the freight?

"A. Yes.

"Q. Did that come to the attention of the Union, did you all know about it?

"A. Yes, we heard about it. Sometimes the employer would call and say, 'I have got a couple of men out here working for me that agree to handle Rayloc goods: what happens if I let them handle it?

"Q. What did you tell them?

"A. I told them, 'Hell, nothing would happen. If they wanted to handle it, let them handle it.'

"Q. If they wanted to handle it, let them handle it.

"A. Yes.

"Q. Did you take any action at all against these men, that is, who said they would handle

it, did you fine them, did you suspend them, did you bring any charges against them?

"A. No, no action has been taken.

"Q. Did you impose any union sanctions or union punishment against these people who did handle the goods?

"A. No."

All of the above testimony is uncontradicted.

The Court of Appeals for the Fifth Circuit attached some importance to fragmentary statements made at secondary sites by two of the job stewards. There was absolutely no evidence introduced in the record upon which to base a finding that job stewards were agents of the union, authorized to speak on behalf of the union in bringing about a work stoppage. The Honorable Boyd Sloan, U. S. District Judge for the Northern District of Georgia, so held in the hearing on application for injunction under Section 10(1) of National Labor Relations Act. The Trial Examiner also so held in the Board hearing. The National Labore Relations Board held that stewards were agents of the local union with authority to speak for the local union on matters such as are involved in this case.

The legal reasoning upon which the Board proceeds in reaching this conclusion, as it appears on Page 47 of the Transcript, is very obscure. As far

as the reader can tell, it contains the following elements:

1. The utilization of "other analogous cases in which the Board has passed upon the status of union job stewards." (In other words, although no such cases, nor any evidence contained therein, nor any customs supposedly derived therefrom were ever suggested at the trial or placed in the record, the Board is obviously drawing upon its own conclusions based on its own knowledge supposedly derived from other completely unrelated cases involving other unnamed and completely unrelated unions.)

2. The Board concludes that the duties and authority described in the evidence in this case are "customary" duties of union stewards, and the Board, feeling that it knows the customary duties and authority of union stewards in other cases, attributes similar authority to the stewards in the case at bar, even though same is directly contrary to the evidence.

3. Although the evidence clearly discloses that the transmission of messages to employees by the stewards was strictly limited to written messages and instructions, and there was no evidence of any deviation by custom or otherwise from this limitation, the Board nevertheless states that it does not regard this limitation "as having any real significance."

4. The Board adapts a phrase "union on the job" (although nothing of the sort appears in the evidence)

and arbitrarily determines that this means that they were "expressly vested with sufficient authority so to act, as to warrant the inference that the actions here attributed to them fell within the scope of the delegated powers."

5. The Board seeks to find nonexistent authority because of the failure of the record to show that its members were specifically advised to disregard actions beyond the stewards' authority. No case is here made of estoppel by apparent authority. No member is asserting ignorance of the limited atuhority or claiming that he acted in reliance on apparent authority. The Board is apparently seeking to create authority purely on the failure of the Local Union to notify the members of the provisions of the Constitution and By-Laws and of the consistent operations of the Local Union thereunder. No suggestion is made in the evidence that the Local Union had ever departed from this procedure or had ever done anything to lead any member to think that stewards had greater authority.

6. The Board finally concludes (Middle of Page 48 of the Transcript) that "In any event, the stewards' activities, fairly viewed, implemented the general policies the Union had officially approved and sponsored.'" (Directly contrary to the evidence.)

The District Judge correctly held to the contrary, based on the unchallenged evidence before him, and refused to indulge in any such far-fetched inferences and strained legal reasoning as this.

The Trial Examiner likewise held in accordance with the evidence before him.

The Court of Appeals did not go into its reasons for attaching any importance to statements made by job stewards but apparently affirmed the Board on this point.

A somewhat similar matter was presented to the United States District Court of the District of New Jersey, in the case of *Reynolds v. Lumber Drivers*, which is presently only reported in 43 LRRM, Page 2001. In this case, the District Judge likewise refused a Section 10(1) injunction, holding that the Regional Director was without reasonable cause, under facts strikingly similar to those in the present case.

In that case, one George Clinton, a union steward, was alleged to have made the statement, "We can't load you"—"You can't be loaded." This statement, attributed to the union steward, was denied by the steward when he was on the stand. Nevertheless, the Court held as follows:

> "As to Clinton being an agent of the union, under subdivision (b)(4) of Section 8 of the Act. I find that there is no evidence whatsoever that this particular shop steward was the agent of Local 522. First of all, I can not draw any inference merely from the title of shop steward; and, secondly, and more importantly there was testimony that his activities and the scope of his activities were limted to a certain filed which ex-

> cluded the type of activity which is censured under the provisions of the Act. It isn't a case of Mr. Clinton being described baldly and nakedly, as a steward with no testimony; he himself testified, and I think that would be enough for me without there being any evidence to the contrary, that he was not acting in the capacity of agent for the union merely by virtue of being steward, under the testimony given in this case."

It is interesting to note in the case presently before us that the Board was not surprised or entrapped by this contention since it was clearly brought out at the 10(1) injunction case, unsuccessfully argued by the Board, and decided against the Board by the District Judge.

In the weeks that elapsed between the injunction case and the hearing before the Trial Examiner, the Board failed to develop and submit any evidence to the Trial Examiner which would in any way contradict the evidence of the Local Union with reference to the authority of their stewards. No evidence of custom, or deviation from the custom, or apparent authority, or reliance thereon by any member, or any other evidence of any sort which would challenge the evidence of the Local Union as to the authority of its stewards, was produced by the Board although the Board had ample time and notice to produce any such evidence, if it existed.

No estoppel by apparent authority was claimed by anyone having a right to so claim or by anyone else, for that matter.

The burden of the Board's reasoning seems to be, in general, that it has tried a lot of other cases, involving other unions and their stewards, and it thinks it knows generally what stewards' duties consist of; that many of the duties of stewards in this case are duties customarily performed by stewards; therefore, the stewards' authority in the case at bar must necessarily be broadened to include duties apparently contained in other records in other cases. And, anyhow, the stewards were the "union on the job," whatever that means. The only way the writer can describe this reasoning is that the Board is saying, "Never mind the evidence—we know better."

There was no dispute in the evidence as to the duties of job stewards, and therefore there are no factual issues to be determined in this regard, but only the question of whether or not the conclusions drawn from the facts are correct.

Mr. Mathis testified with reference to duties of job stewards, as follows:

(By Mr. Cordes):

Q. Mr. Mathis, I will hand you a copy of a pamphlet entitled "By-Laws of Truck Drivers and Helpers Local 728, Atlanta, Georgia." It

is open to page 13, where the heading appears "Duties of Stewards." Is that the current by-laws of Local 728?

A. Yes, it is.

Q. Is it correct in its statement of how stewards are selected; or appointed?

A. No, it is not correct as to how they are selected; it is correct generally as to how they are appointed.

Q. Would you explain the selection and appointment of stewards?

A. The selection of a steward is made by—in a meeting with the members that work at the place, and are selected by a vote. (21) Then they are appointed by either an officer of the local union or the Executive Board.

Q. Which officers of the local union have the authority to appoint a steward?

A. Any of the agents or assistant agents.

Q. Is that business agents?

A. Yes.

Trial Examiner:

Was the answer "Yes"?

The Witness:

Yes.

Q. Do the duties of stewards include the transmission of messages or information from the business agent or assistant agents to employees?

A. Only in writing.

Q. Only in writing?

A. Yes.

Q. Do the business agents and assistant business agents have the authority to remove stewards from office?

A. Only the business agent. R. C. Cook, President of the Local Union, is the business agent; everybody else is assistant.

Q. Do I understand you to say that the duties of union steward do not include the transmission of any verbal messages unless they are in writing?

A. Well, if I want to see a particular man on the job, I might call the steward and ask him to tell him to come to see me, but as far as notices and messages to members, generally always, in fact, I can't think of the time we did not, write a letter to the steward and ask him to post it on the board. Any other time that we would have messages for the members we would call a meeting. (Appendix to Petitioner's Brief, Pages 8 and 9, for the Court of Appeals).

Additional evidence as to duties of stewards will be found on page 31, through the first nine lines of Page 32, the last thirteen lines of Page 115, the first eight lines of 134, the last eight lines of 152, and all of Page 153 of Appendix to Petitioner's Brief in the Court of Appeals.

It is respectfully submitted that, in view of the failure to prove agency or union responsibility for any statements made, it is immaterial what the stewards may have said. The petitioner would like to point out, however, that only two isolated statements are cited by the Court of Appeals. The statement made by Woodbury was in answer to a question propounded by the employer as to whether the employees would permit a supervisor to handle the Genuine Parts freight. The answer which Woodbury gave was merely an expression of his best opinion in answer to an interrogation by his employer. Of course, he could have spoken an untruth and said that he did not believe the employees would object to the supervisor handling the Genuine Parts freight. However, it would hardly seem incumbent upon Woodbury to express other than his honest opinion when he was asked. There mere answering of this question by the expression of an opinion was in no way a direction to the employees as to what they should do. It was not illegal to induce an *employer* not to handle struck freight, but only to induce the *employees* not to handle such freight. It is therefore respectfully submitted that aside from the failure to prove union responsibility as to the statement by Woodbury, the decision

of the Board and of the Court of Appeals that there was a violation of the law in this statement, is not justified.

The only other statement cited was the testimony of Butler, who was not shown to have the authority to speak for the union in making such statements as he was alleged to have made. The Trial Examiner, in finding that the union was not responsible for the statement of Butler, said:

> "But in addition to the question of his authority as a steward and the union's responsibility for his acts or statements, no finding, pro or con, could properly be based on his testimony, as review of such testimony will readily disclose."

The petitioner is not requesting that this court resolve any question of credibility. In view of the failure to establish agency, no question of credibility was ever actually reached by the Trial Examiner, the Board or the Court of Appeals. The Court of Appeals did not expressly rule upon the question of agency and union responsibility, but merely stated that the evidence revealed said statements of Woodbury and Butler.

It is respectfully submitted in conclusion that the Union merely carried out its legal obligations under a legal contract and in no way induced employees of secondary employers in violation of the National Labor Relations Act. The decision of the U. S. Court

of Appeals for the Fifth Circuit has made it impossible for any union to fulfill its contractural obligations under such a contract and has thrown into doubt the bargaining relationship and rights between capital and labor under such contracts throughout the entire transportation industry. Unless this matter is determined by the U. S. Supreme Court; the bargaining relationships between capital and labor in the transportation industry will be filled with uncertainty and thrown into utter chaos, thereby defeating the primary purpose of the National Labor Relation Act.

Petitioner therefore prays that this, its Petition for Writ of Certiorari, be granted and that this Honorable Court review the said decision and the decree entering judgment thereon.

Respectfully Submitted.

By: Edwin Pearce

Edwin Pearce
ATTORNEY FOR PETITIONER
IN CERTIORARI

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CERTIFICATE OF SERVICE

I hereby certify that I have served copies of the above Petition for Writ of Certiorari, as required by law, upon the National Labor Relations Board, by mailing same by Registered Mail, on the 23rd day of October, 1959.

Edwin Pearce

Edwin Pearce
ATTORNEY FOR PETITIONER
IN CERTIORARI

APPENDIX

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 17288

TRUCK DRIVERS AND HELPERS LOCAL UNION NO. 728 INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Petitioner.

versus

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition for Review of an Order of the National Labor Relations Board, sitting at Washington, D. C. (Georgia case.)

(April 8, 1959.)

Before HUTCHESON, Chief Judge, and BROWN and WISDOM, Circuit Judges.

WISDOM, Circuit Judge: The matter before us concerns a secondary boycott by members of the Teamsters Union. Two questions are before us. (1) Did the Union induce the boycott or was the boycott a result of individual action? (2) Were the union activities privileged under the hot cargo clause?

The Union is the certified bargaining agent of the production and maintenance employees of the Rayloc Division of the Genuine Parts Company.[1] The National Labor Relations Board found that the Union violated Section 8(b)(4)(A)[2] of the National Labor

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[1] Truck Drivers and Helpers Local No. 728, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO.

Genuine Parts Company is engaged in the manufacture, rebuilding and wholesaling of automotive parts. Its Rayloc Division, here involved, shipped from its Atlanta plant to customers outside the state, products of a value in excess of $500,000.

[2] Section 8(b)(4)(A) of the Act declares it to be an unfair labor practice for a labor organization or its agents: "to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to . . . handle or work on any goods . . . where an object thereof is: (A) forcing or requiring any employer . . . to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person." 61 Stat. 141, 29 USCA 158(b)(4)(1952).

Relations Act. 61 Stat. 136, 29 USCA 141 et seq. The Board held that the Union induced the employees of freight carriers in the Atlanta, Georgia, area to refuse to handle freight from Rayloc in order to force the carriers to stop doing business with Rayloc.* The Board issued a cease and desist order against such Union action. The Union filed a petition to review and set aside the order. In its answer the Board asked for enforcement of its order. We deny the petition and grant enforcement of the Board order.

I.

The Union is the certified bargaining agent of the production and maintenance employees of the Rayloc Division of the Genuine Parts Company. March 12, 1956, the Teamsters struck in support of collective bargaining demands made upon Genuine Parts and set up picket lines at all Genuine Parts installations in the Atlanta area.

Most of the employees of the various freight carriers in Atlanta who perform trucking services for Genuine Parts are members of the Teamsters Union. The labor contract with the carriers contain a hot cargo

* The Board's decision and order are reported at 119 NLRB No. 53. The order was issued pursuant to Section 19(c) of the National Labor Relations Act, as amended (61 Stat. 136, 29 USCA 151 et seq.). This Court has jurisdiction under Section 10(e) and (f) of the Act, the unfair labor practices having occurred in Atlanta, Georgia, within this judicial circuit.

clause, sanctioning the refusal of union members to go through a picket line and refusal to handle non-union, "unfair" or "struck" goods. When the carrier employees refused to go through the picket lines, Genuine Parts got the freight to the carrier docks on its own, and the carriers experienced little difficulty in getting their employees to handle the Genuine Parts freight that came to their docks. All went well with the carriers until March 27. That day the Union held a special meeting of its members.

The clause reads: "It shall not be a violation of this Agreement and it shall not be cause for discharge if any employee or employees refuse to go through the picket line of a Union or refuse to handle unfair goods. Nor shall the exercise of any rights permitted by law be a violation of this Agreement. The Union and its members, individually and collectively, reserve the right to refuse to handle goods from or to any firm or truck which is engaged or involved in any controversy with this or any other Union; and reserve the right to refuse to accept freight from, or to make pickups from or deliveries to establishments where picket lines, strikes, walkout or lockout exist. "The term 'unfair goods' as used in this Article includes, but is not limited to, any goods or equipment transported, interchanged, handled or used by any carriers, whether party to this Agreement or not, at any of whose terminals or places of business there is a controversy between such carrier, or its employees on the one hand, and a labor union on the other hand; and such goods or equipment shall continue to be 'unfair' while being transported, handled or used by interchanging or succeeding carriers, whether parties to this Agreement or not, until such controversy is settled. "The Union agrees that, in the event the Employer becomes involved in a controversy with any other union, the Union will do all in its power to help effect a settlement. "The Union shall give the Employer notice of all strikes and or the intent of the Union

The meeting was called by the Union's Secretary-Treasurer, Mathis "for the specific purpose of determining whether the members wanted to handle the goods of Genuine Parts and Rayloc or not to handle them". The Union's total membership is about 5,500. Of this number, 2,500 are covered by the area-wide labor contracts between the carriers and the Union. 400 attended the meeting. No employees were present from at least three or four of the carriers subject to the agreements.

Secretary-Treasurer Mathis opened the meeting by bringing the employees up to date on the bargaining difficulties the Union was having with Genuine Parts: the Union could not get any kind of "decent agreement". The purpose of the meeting, Mathis said, was to determine whether the members (carrier employees) would support the strike against Genuine

---

to strike any Employer, and or place of business, and or the intent of members' refusal to handle unfair goods. The Carriers will be given an opportunity to deliver any and all freight in their physical possession at the time of receipt of motive. Any freight received by a carrier up to midnight of the day of notification shall be considered to be in its physical possession. However, freight in the possession of a connecting carrier shall not be considered to be in the physical possession of the delivering carrier. The insistence on the part of Employer that his employees handle unfair goods or go through a picket line after they have elected not to, and such refusal has been approved in writing by the responsible officals of the Southern States Drivers Council, shall be sufficient cause for an immediate strike of all such Employer's operation without any need to go through the grievance procedure herein."

Parts by refusing to handle its hot cargo. He read the hot cargo clause to the members present, outlined the machinery by which they might avoid the prohibitions of Section 8(b)(4)(A), and stated that a resolution would be presented by the membership for their acceptance or rejection.

Skilfully, and all in one breath, Mathis called for individual action (to avoid the secondary boycott provision of the Act) and at the same time promised to back it up with collective strike action by the Union. After a full discussion, one of the members, Kent, still under the impression that Mathis wanted group action, moved "that the members of Local 728 refuse to handle the goods of Rayloc and Genuine Parts". This was a clear call for collective secondary action, showing that at least Kent failed to understand Mathis' distinctions between individual and group action. Mathis rejected Kent's resolution, because it did not state that the employees desired "to exercise their rights as individuals". Mathis then presented his own resolution. This resolution was adopted unanimously. It reads, in part, as follows:

> "Each member has the right to make an individual voluntary decision as to whether he will or will not handle goods or equipment consigned to or received from this Company. In accordance with this right each of the members has made and now announces his individual voluntary decision not to handle such goods. Under the . . . [Articles of agreements with the carriers] it is the obligation of the Union to give each employer

notice of the intent of the members to refuse to handle these unfair goods and in order to comply with the obligations of these Articles, the officials of the Union are hereby requested to notify each carrier employer of the intent of these members to refuse to handle these described unfair goods."

The day after the meeting the Union notified the carriers that, exercising their rights under the hot cargo clause, "the members have each made an individual voluntary decision to refuse to handle goods or equipment consigned to or received from" Genuine Parts. Thereafter, any employee who was asked to handle the freight gave the stock reply: "I personally refuse to handle." None of the employees were discharged. There was evidence that the Union advised carrier employers that a discharge would provoke a strike.

Aside from the general refusal expressed by the employees after the meeting, Union stewards at the premises of two carriers encouraged specific refusals. Woodbury, a steward, told Simpson, of the Simpson Express Company, that if he handled the freight, "the boys would probably walk off the job". The Union denies that Woodbury made the statement, but Simpson's testimony is to the contrary. The statement was made in front of the employees. Union steward Jimmie Butler told the employees at Akers Motor Lines that he would file a grievance against them if they handled "scab freight" of Genuine Parts.

The Union argues that we should set aside the Board's order because the record does not show that the action of the employees was induced or encouraged by the Union: (1) the employees were merely exercising their individual rights not to handle the freight: (2) the special meeting was called only for the purpose of finding out what the employees were going to do, to explain their rights under the contracts, and this, says the Union, was the only way it could give advance notice to the employers, as it was bound to do under the hot cargo clauses, that the employees were not going to handle the freight.

The Union's special meeting must be viewed against the whole background of the case. The Union was striking against Genuine Parts. The carriers' employees were respecting the picket line, but Genuine Parts was getting its own freight to the carriers with its own vehicles and by hiring independent drayage companies. Thus, the picket lines were not taking effect. It was only then that the Union called its meeting to find out if the carrier employees would refuse to handle the freight. Mathis assured the secondary employees that the Union would back them up by collective strike action and threatened reprisals against the secondary employers. It seemed to the Board, and it seems to us, that the distinction between individual action and collective action was not just fuzzy and confused: there was a deliberate attempt to produce collective union action by the Union acting as a union but termed for the purpose subterfuge, individual action. The meeting was called by the

Union's Secretary, conducted by union officers, and the members voted as members of the Union. The result of the meeting was the unanimous passage of a resolution that committed all the members, even absent members, to a secondary boycott. Under the resolution there is no room for any discretion by any employees who might later decide to handle the goods. It binds all in advance, preventing the exercise of individual action at the time when individual action is meaningful—that is, when the goods arrive at the dock to be unloaded.

We are persuaded, as was the Board, that the action was union action to induce the employees of the carriers not to handle the freight and to impose the Teamsters' will on the secondary employees and employers. The words "induce and encourage" in Section 8(b)(4)(A), the Supreme Court states, are "broad enough to include in them every form of influence and persuasion". *International Brotherhood of Electrical Workers, Local 501 v. NLRB*, 1950, 341 U.S. 694, 71 S.Ct. 954, 95 L.Ed. 1299. They cover the union activities in this case.

Whatever contractual duty the Union had to notify the carriers that their employees would not handle the freight from Genuine Parts, and even if a meeting is a practical way of ascertaining the employees' intentions, this duty is still subordinate to the statutory proscription of Section 8(b)(4)(A).

II.

After the Board decided the Genuine case, the United States Supreme Court shed a great deal of light on the perplexing problem of secondary boycott in its decision in Local 1976, *United Brotherhood of Carpenters etc. v. NLRB*, 1958, 357 U.S. 93, 78 S.Ct. 1011, 2 L.Ed. 2d 1186. The Supreme Court pointed out that although Section 8(b)(4)(A), like the entire Taft-Hartley Act, was designed to protect the public interest, Congress did not intend to shield the public from secondary boycotts no matter how brought about. "Congress' purpose was more narrowly conceived." It aimed to prohibit "coercion of neutral employers, themselves not concerned with a primary labor dispute, through the inducement of their employees to engage in strikes or concerted refusals to handle goods". The Court held, however, that a hot cargo clause, although not illegal per se, is not a shield of immunity to conduct prohibited in Section 8(b)(4)(A). "Thus inducements of employees that are prohibited under Section 8(b)(4)(A) in the absence of a hot cargo provision are likewise prohibited when there is such a provision [in a labor contract]." The Supreme Court said:

> "[Section 8(b)(4)(A)] describes and condemns specific union conduct directed to specific union objectives. It forbids a union to induce employees to strike against or to refuse to handle for their employer when an object is to force him or another person to cease doing business with

some third part. Employees must be induced; they must be induced to engage in a strike or concerted refusal; an object must be to force or require their employer or another person to cease doing business with some third person."

Wtih these criteria in mind, we hold that there is substantial evidence in the record to support the Board's finding that the Union violated Section 8(b)(4)(A). *Universal Camera Corporation v. NLRB*, 1950, 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456.

III.

The Union argues that the Board's order is too broad and should be modified. The order directs the Union to cease and desist from engaging in or from inducing and encouraging carrier employees to engage in a strike or concerted refusal to handle Genuine Parts freight, or the freight of "any other like person or company who has business relations with aforementioned carriers in the Atlanta area". The Board argues that the Union's repeated violations of the Act's secondary boycott provision justifies a broad order. *NLRB v. Express Publishing Co.*, 1941, 312 U.S. 426, 61 S.Ct. 693, 85 L.Ed. 930. On the basis of the record before us we think that the order goes beyond the power of the Board and must be modified by deleting the words "*or with any other like person or company who has public relations with aforementioned carriers in the Atlanta area*". *NLRB v. Ford Motor Co.*, 1941, 5 Cir., 119 F. 2d 326.

Enforcement of the Board's order as herein modified is GRANTED.

A true copy

(SEAL)

Test:

/s/ Edward W. Wadsworth
EDWARD W. WADSWORTH

Clerk, U. S. Court of Appeals, Fifth Circuit
New Orleans, Louisiana

OCT 16 1959

JUDGMENT

Extract from the Minutes of April 8, 1959

TRUCK DRIVERS AND HELPERS LOCAL UNION NO. 728, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

No. 17288 versus

NATIONAL LABOR RELATIONS BOARD.

This cause came on to be heard on the petition of Truck Drivers and Helpers Local Union No. 728 International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, for review of an order of the National Labor Relations Board made on November 8, 1957 in the proceeding known upon the records of the Board as Case No. 10-CC-141, and was argued by counsel:

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged and decreed by this Court that enforcement of the Board's order, as modified by the opinion of this Court be, and the same is hereby granted.

ORDER DENYING REHEARING

Extract from the Minutes of June 11, 1959.

TRUCK DRIVERS AND HELPERS LOCAL UNION NO. 728, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

No. 17288. versus

NATIONAL LABOR RELATIONS BOARD.

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

(ORIGINAL FILED—JULY 31, 1959)

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

TRUCK DRIVERS AND HELPERS LOCAL UNION NO. 728 INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Petitioner,

v. 17288

NATIONAL LABOR RELATIONS BOARD,

Respondent.

DECREE ENFORCING, AS MODIFIED, AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Before: Hutcheson, Chief Judge, and Brown and Wisdom, Circuit Judges:

This cause came on to be heard upon the petition of the National Labor Relations Board to enforce its order dated November 8, 1957. The Court heard argument of respective Counsel on January 28, 1959, and on April 8, 1959, after having considered the transcript of record and briefs filed in this cause, handed down its decision enforcing as modified the order of the Board. In conformity therewith, it is hereby

ORDERED, ADJUDGED AND DECREED that the Petitioner Truck Drivers and Helpers Local Union No. 728 International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and its officials and agents, shall:

1. Cease and desist from engaging in, or from inducing and encouraging employees of Simpson Trucking Co. and of Akers Terminal Co. and of any other freight carrier employers in the Atlanta, Georgia, area, employing members of the Petitioner, to engage in, a strike or concerted refusal in the course of their employment to process, transport, or otherwise handle or work on goods, articles, or commodities or to perform services for their respective employers, where an object thereof is to force or require any such employer to cease doing business with Genuine Parts Company.

2. Take the following affirmative action, which the Board has found will effectuate the policies of the National Labor Relations Act, as amended, hereinafter called the Act:

(a) Post at its business offices at Atlanta, Georgia, and at all other places where notices to its members are customarily posted, copies of the notice marked Appendix. Copies of said notice, to be furnished by the Regional Director for the Tenth Region of the National Labor Relations Board, Atlanta, Georgia, shall after being duly signed by an official representative of the Petitioner, be posted by the Petitioner im-

mediately upon receipt thereof and be maintained by it for a period of sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to members of the Petitioner are customarily posted. Reasonable steps shall be taken by the Petitioner to insure that said notices are not altered, defaced, or covered by any other material.

(b) Cause a copy of said notice to be printed, at Petitioner's expense, in a daily newspaper of general circulation in Atlanta, Georgia.

(c) Mail to the aforesaid Regional Director signed copies of said notice for posting at the premises of Genuine Parts Company, Simpson Express Co., Akers Terminal Company, and of other freight carriers employing members of the Petitioner, if willing, in places where notices to their employees are customarily posted.

(d) Notify the said Regional Director in writing, within ten (10) days from the date of this Decree, what steps the Petitioner has taken to comply herewith.

ENTERED: JUL 31 1959

APPENDIX

NOTICE TO ALL EMPLOYEES PURSUANT TO A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER AS MODIFIED

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our members that:

WE WILL NOT engage in, or encourage employees of SIMPSON TRUCKING CO., of AKERS TERMINAL CO., or of any other freight carrier employer in the Atlanta, Georgia, area employing members of our Union to engage in, a strike or concerted refusal to the course of their employment to process, transport, or otherwise handle or work on goods, articles, or commodities or to perform services for their respective employers where an object thereof is to force or require any such employer to cease doing business with Genuine Parts Company.

TRUCK DRIVERS AND HELPERS LOCAL UNION NO. 728, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO

Dated

By

(Representative) (Title)

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

I, EDWARD W. WADSWORTH, Clerk of the United States Court of Appeals for the Fifth Circuit, do hereby certify that the foregoing three (3) pages, numbered from -1- to -3-, inclusive, contain a true copy of the Decree Enforcing, as Modified, an Order of the National Labor Relations Board, in the case of TRUCK DRIVERS AND HELPERS LOCAL UNION NO. 728, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, Petitioners, No. 17,288 versus NATIONAL LABOR RELATIONS BOARD, Respondent, as the same remains upon the files and records of said United States Court of Appeals.

IN TESTIMONY WHEREOF, I hereunto subscribe my name and affix the seal of said United States Court of Appeals, at the City of New Orleans, Louisiana, this 31st day of July, A.D. 1959.

(SEAL)

EDWARD W. WADSWORTH, CLERK
By /s/ Clara R. James
Chief Deputy Clerk,
U. S. Court of Appeals
for the Fifth Circuit.

FILE COPY

Office-Supreme Court, U.S.
FILED
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[illegible], Clerk

No. 351

In the Supreme Court of the United States

October Term, 1950

TRUCK DRIVERS AND HELPERS LOCAL UNION NO. 728, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
Department of Justice,
Washington 25, D. C.

STUART ROTHMAN,
General Counsel,

THOMAS J. McDERMOTT,
Associate General Counsel,

DOMINICK L. MANOLI,
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Attorney,
National Labor Relations Board,
Washington 25, D. C.

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In the Supreme Court of the United States

October Term, 1959

No. 501

TRUCK DRIVERS AND HELPERS LOCAL UNION NO. 728, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 59-70) is reported at 265 F. 2d 439. The Board's decision and order (R. 66-142)[1] are reported at 119 NLRB 399.

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[1] References to Volume I, Transcript of Record, printed pursuant to the rules of the court below, are designated "R." References to portions of the testimony and exhibits,

JURISDICTION

The judgment below was entered on April 8, 1959 (Pet. 71). A petition for rehearing was denied on June 11, 1959 (Pet. 72), and a formal decree enforcing the Board's order, as modified, was entered on July 31, 1959 (Pet. 73). The petition for certiorari was filed on October 28, 1959.[2] The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTION PRESENTED

Whether substantial evidence supports the Board's finding that petitioner Union induced and encouraged the employees of freight carriers to refuse to handle the freight of ~~General~~ Parts Company in violation of Section 8(b)(4)(A) of the National Labor Relations Act.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*) are set forth at pp. 7-8 of the petition.

---

printed by the petitioner and the Board as appendices to their briefs below, are designated by the symbols "P.A." and "B.A." Occasional references to portions of the testimony not so printed are designated "Tr."

[2] There may be a question as to the timeliness of the petition. If the time for filing a petition for certiorari is to be calculated from the date of denial of the petition for rehearing rather than the date of entry of the formal decree, the petition is untimely. 28 U.S.C. 2101(c); Rule 22(3), Revised Rules of the Supreme Court of the United States. Cf. *United States* v. *Schaefer Brewing Co.*, 356 U.S. 227.

STATEMENT

A. *The Board's findings and conclusions.*—The Board found that petitioner Union violated Section 8(b)(4)(A) of the Act by inducing and encouraging the employees of several freight carriers to refuse to handle the freight of the Genuine Parts Company, with the object of forcing or requiring the carriers to cease doing business with Genuine Parts. The evidence upon which the Board based its findings is summarized below.

On March 12, 1956, the Union, which is the certified bargaining representative of the production and maintenance employees of the Rayloc Division of Genuine Parts, initiated a strike in support of bargaining demands, and on March 19 set up picket lines at all Genuine Parts installations in the Atlanta area (R. 18, 22, 34; B.A. 30, 34). Most of the freight carriers performing services for Genuine Parts employ members of the Union under area-wide agreements containing the "hot cargo" clause set forth at pp. 8-9 of the Petition (R. 4, 5, 22-23; 68; P.A. 19-20, 48). Although the Union had not notified the carriers of the picketing pursuant to the provisions of the contract, the employees of the carriers respected the picket lines at the Genuine Parts installations (R. 70; B.A. 8, 13, 24-25, 30, 43). Thereupon, the freight from Genuine Parts was delivered to the docks of the carriers by independent drayage companies or by vehicles of Genuine Parts itself (R. 70; B.A. 13, 24-25, 30), and until the day after the Union meeting of March 27, the carriers experienced little difficulty in

having their employees handle Genuine Parts freight at the carriers' docks (R. 70; B.A. 25, 27).

Union Secretary-Treasurer Mathis called a "special meeting" of the Union for March 27, and each steward was so advised by a letter, which was in turn to be posted on the bulletin boards provided by the carriers (R. 70; P.A. 1, 10, 23). According to Mathis, the meeting was called "for the specific purpose of determining whether the members wanted to handle the goods of Genuine Parts and Rayloc or not to handle them" (P.A. 10). Of a total membership of 5,500, of which 2,500 were covered by the agreements containing the "hot cargo" clause, approximately 400 attended the meeting (R. 35; P.A. 5, 20, 136). No employees were in attendance from three or four of the carriers subject to the agreements (P.A. 6).

Mathis, who presided, opened the meeting by reporting to the membership that negotiations with Genuine Parts had been conducted for four or five months, but Genuine Parts refused to grant any pay increase or, for that matter, any kind of a "decent agreement" (R. 36; P.A. 12-13, 148). Mathis stated that the Union had been receiving telephone calls from members wanting to know about handling Genuine Parts freight, and that the purpose of the meeting was "to determine what they wanted to do" (P.A. 13). He proceeded to read the "hot cargo" clause, which provided, *inter alia*, that the members "individually" reserved the right to refuse to handle "unfair" goods, and that the insistence of an employer that his employees handle "unfair" goods "after they have elected not to" shall be "sufficient cause for an

immediate strike of" his operations "without any need to go through the grievance procedure" (P.A. 25, Pet. 8-9). A discussion then ensued for about one hour, during which Mathis indicated that "there probably would be a resolution adopted during the course of the meeting (P.A. 27, 148, B.A. 40).

At the conclusion of the discussion, Member Kent moved "that the members of Local 728 refuse to handle the goods of Rayloc and Genuine Parts" (P.A. 27-28, B.A. 41). But Mathis rejected the motion because it did not state that the employees desired "to exercise their rights as individuals" to refuse to handle the goods (P.A. 28, Tr. 245). Accordingly, Mathis himself drafted the following resolution:

> * * * each member has the right to make an individual voluntary decision as to whether he will or will not handle goods or equipment consigned to or received from this Company [Genuine Parts].
>
> In accordance with this right each of the members has made and now announces his individual voluntary decision not to handle such goods.
>
> Under the * * * Articles [of the agreements with the carriers], it is the obligation of the Union to give each employer notice of the intent of the members to refuse to handle these unfair goods and in order to comply with the obligations of these Articles, the officials of the Union are hereby requested to notify each carrier employer of the intent of these members to refuse to handle these described goods [P.A. 148-149, Tr. 246-248, 250-252].

Mathis' resolution was adopted unanimously by a show of hands (P.A. 10, 29, 149, B.A. 41).

On March 28, the Union, through its assistant business agent, sent the following notice to all freight carriers who were parties to the area-wide "hot cargo" contract:

> To All Operators:
>
> Dear Sir: As you may know, Teamsters' Local 728 is on strike and engaged in picketing Genuine Parts Company's Atlanta area offices and plants, including the Rayloc plant.
>
> In pursuance of their rights under Article IX of the Southeastern Area Over-the-Road Motor Freight Agreement and Article XI of the Local Freight Forwarding Pickup and Delivery Agreement, the members have each made an individual voluntary decision to refuse to handle goods or equipment consigned to or received from this Company. This election has been approved in writing by the responsible officials of the Southern States Drivers' Council.
>
> Under the provisions of the above-mentioned Articles, the Union has the obligation to give you notice of the intent of the members to refuse to handle these unfair goods, and the members have requested that we give you this notice. This letter will serve as such notice [R. 71; P.A. 7].

Following the March 27 Union meeting, the employees of most of the carriers uniformly refused to handle Genuine Parts freight (R. 71-72; P.A. 9).[3]

---

[3] According to Mathis, he had been advised of "some instances" in which members did handle Genuine Parts freight. However, he was unable to recall the name of any employer

When asked to handle such freight, the employees used the stock reply: "I personally refuse to handle" (R. 72; B.A. 11). Indeed, it was stipulated at the hearing that the Union had a "number of witnesses" (230 in all) who would testify, if called, that they were employed by carriers who were parties to the contract and had refused to handle Genuine Parts goods on "one or more occasions" after March 27 (R. 28-29, 72). Some of these members had attended the Union meeting and some had not (R. 28-29, 72).

On April 6, a few days after the Union meeting, a Genuine Parts truck delivered freight to the dock of the Simpson Express Company for carriage over the Simpson line (R. 49; B.A. 13). B. C. Simpson, president of the company, saw Dock Foreman Roan in conversation with Union Steward Woodbury (R. 49, 104; B.A. 13-14). Joining them, Simpson heard Woodbury, who was holding a bill of lading in his hand, state that he could not handle the freight because it was from Genuine Parts (R. 49; B.A. 14-15). When Simpson asked that the freight be handled because the company might be sued if it was not, Woodbury replied that he would "have to call the union hall and see what they say" (R. 49; B.A. 15, 22). Woodbury then made a telephone call at a nearby booth and returned to say: "They told me not to; we can't handle it" (R. 49; B.A. 15, 22). In reply to the query to whom he had spoken, he

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so involved, nor was there any other evidence presented indicating that the boycott of Genuine Parts goods was not complete (R. 72; B.A. 4, P.A. 17).

named Union Assistant Business Agent Pulliam (R. 49; B.A. 15, 23).

A short time later, in the presence of several employees, Simpson asked Steward Woodbury if he would ask the employees to handle the Genuine Parts freight, but Woodbury stated he could not (R. 49, 104; B.A. 15-16). Simpson then asked employee Fulcher, in Woodbury's presence, to handle the freight (R. 49, 104; B.A. 18-19, 23). Fulcher replied he could not do so, "if the steward told him not to handle it," and Woodbury said nothing (R. 50, 104; B.A. 19-20). Finally, Simpson asked the group of employees assembled on the dock what would happen if Simpson, himself, should handle the freight (R. 50, 104; B.A. 18). Woodbury replied that "the boys would probably walk off the job" (R. 50, 104; B.A. 18). The Genuine Parts truck then departed (B.A. 18).

Prior to the Union meeting of March 27, the employees of Akers Motor Lines handled Genuine Parts freight which was delivered to Akers by a local drayage company (R. 52-53; B.A. 25). During this period Union Steward Jimmie Butler told the employees he "would file a grievance against them if they handled the freight" (R. 104; B.A. 32). On March 28, Akers received the Union's letter notifying all carriers that the employees intended to refuse to handle Genuine Parts freight (R. 53; B.A. 25). Beginning on March 30, the employees refused to handle such goods, and on the same day the terminal manager for Akers received a phone call from Union Secretary-Treasurer Mathis who stated: "You are

not supposed to ask the men to handle it after you received our letter. If you handle any more, I will have to strike you" (R. 53-54, 81-82; B.A. 25-27).

Similarly, when the terminal manager of Benton Motors Express asked, after the March 27 meeting, whether his employees might handle Genuine Parts freight, two Union business agents gave him a "friendly tip"—that he would have "trouble" if he insisted. Thereafter, Mathis phoned the manager and warned him that, under the contract, the employer could not insist that the employees handle goods which they had elected not to handle (R. 81-82; B.A. 9-10).

On the basis of the foregoing, the Board found that by calling and conducting the special meeting for the purpose of considering the "hot cargo" action of the membership, by drafting and sponsoring the resolution by which the members present collectively announced the "individual" decisions of all the members, and by the other conduct set forth *supra*, pp. 7-9, the Union had induced and encouraged the employees of the carriers to engage in a concerted refusal in the course of their employment to handle Genuine Parts freight, with the object of forcing the carriers to cease doing business with Genuine Parts, in violation of Section 8(b)(4)(A) of the Act (R. 26-27, 81-82, 106). In so holding, the Board also found that the Union's action was not privileged by the "hot cargo" clause (R. 101).[4]

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[4] A majority of the Board also found that the clause was invalid. However, in view of this Court's supervening holding in *Local 1976, Carpenters' Union* v. *National Labor Rela-*

B. *The Board's order.*—The Board's order (R. 107-109) required the Union to cease and desist from inducing and encouraging the employees of the carriers to engage in a strike or concerted refusal to handle Genuine Parts freight to force any such employer to discontinue doing business with Genuine Parts or "with any other like person or company who has business relations with aforementioned carriers in the Atlanta area."

C. *The decision of the court of appeals.*—The court below held that the activities set forth at pp. 4-9, *supra*, constituted "union action to induce the employees of the carriers not to handle the freight and to impose the Teamsters' will on the secondary employees and employers" (Pet. 67) and "that there is substantial evidence to support the Board's finding that the Union violated Section 8(b)(4)(A)" (Pet. 69). The court enforced the Board's order, after deleting the words "or with any other like person or company who has public relations with aforementioned carriers in the Atlanta area" (Pet. 69-70).

ARGUMENT

As petitioner states (Pet. 29, 32), the decisive issue in this case is whether the Union meeting of March 27 was utilized for the purpose of inducing the members to refrain from handling the goods of Genuine Parts or whether it was a mere effort on the part of the Union to inform the members of their

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tions Board, 357 U.S. 93, that a "hot cargo" clause is not a defense under Section 8(b)(4)(A), irrespective of its validity, this aspect of the Board's decision played no part in the judgment of the court below and is no longer significant.

individual right to refrain from handling these goods and to ascertain their wishes.[5] The Board found on the record as a whole that the purpose of the meeting was to bind the membership to the decision of the Union officials to boycott Genuine Parts' goods and that the meeting was conducted in such a manner as to constitute inducement and encouragement of employees to engage in the boycott, in violation of the Act. Petitioner's attack upon the adequacy of the evidentiary support for this factual finding, sustained by the court below, presents no issue warranting review by this Court.

In any event, the Board's findings in this respect are clearly supported by the record. That the special meeting was merely a guise for embarking on a Union-sponsored boycott is shown by the fact that

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[5] Contrary to petitioner's intimation (Pet. 22-23), there is no issue here as to the legality of the so-called "Protection of Rights" or "hot cargo" clause. As noted above, the Board found that petitioner illegally induced the employees to engage in secondary work stoppages and, in addition, that the "hot cargo" clause was also violative of the Act. Subsequently, however, this Court held in *Local 1976, Carpenters' Union* v. *National Labor Relations Board*, 357 U.S. 93, that such a clause is not a defense under Section 8(b)(1)(A) of the Act, irrespective of its validity. Accordingly there no longer is any occasion in the instant case to consider the legality of the clause itself. Moreover, it may be pointed out that Section 701(b), Labor-Management Reporting and Disclosure Act of 1959 (Public Law 86-257), 73 Stat. 543, makes it an unfair labor practice for a labor organization and an employer to enter into an agreement, express or implied, whereby such employer "ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person * * *."

it was held only after the effectiveness of the Union's picket line was being dissipated (pp. 3-4, *supra*); by the manner in which Secretary-Treasurer Mathis conducted the meeting (pp. 4-6, *supra*); and by Mathis' introduction of his own resolution which, although it contained the words "individual voluntary decision," rigidly committed all affected members, even the absent 2,000, to a collective or Union boycott (p. 5, *supra*). The resolution did not purport to give the individual member any discretion as to whether he would or would not handle Genuine Parts freight at the time when choice became most meaningful, *i.e.*, when the goods arrived at the carrier's dock and the carrier requested the employee to handle them (see *Local 1976, Carpenters' Union* v. *National Labor Relations Board*, 357 U.S. 93, 105). Moreover, after the Union meeting, the employees gave the same answer, "I personally refuse to handle," when asked to handle Genuine Parts freight (p. 7, *supra*), and Mathis threatened at least two carriers with strikes if they insisted that their employees handle the freight (pp. 8-9, *supra*). Finally, the actions and statements of two of the Union stewards (pp. 7-8, *supra*) furnish direct proof that the Union's objective was inducement of carrier employees not to handle the freight. Indeed, the actions and statements of the stewards constituted such inducement.* In this setting, there was

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*There is no substance to petitioner's subsidiary contention (Pet. 17-57) that there is no basis in the record for holding it responsible for the acts and statements of its stewards. The evidence shows that the stewards performed

ample basis for the Board to conclude that the Union violated the statutory prohibition against inducement or encouragement of employees to engage in secondary work stoppages—a prohibition which is "broad enough to include * * * every form of influence and persuasion." *International Brotherhood of Electrical Workers* v. *National Labor Relations Board*, 341 U.S. 694, 701-702.

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the usual duties generally associated with the position, including the transmission of official Union messages and instructions (R. 102-103; P.A. 9-10, 152-153), and employee Fulcher stated that he could not handle the freight "if the steward told him not to" (p. 8, *supra*). To the employees, the stewards were the "Union on the job" (R. 103). The contract, which purports to limit the authority of the stewards to call work stoppages to situations "authorized by official action of the Union" (R. Ex. 3, Art. V), does not require written authorization, and, further, the contract limitation cannot detract from the otherwise apparent authority of the stewards to call Union work stoppages. In these circumstances the Board could properly find, as it did, that the stewards were acting for and on behalf of the Union.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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